

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 17, 2007

ROCKY J. HOLMES v. STATE OF TENNESSEE

Appeal from the Circuit Court for Marshall County
No. 16444 Robert Crigler, Judge

No. M2006-02286-CCA-R3-PC - Filed February 6, 2008

The petitioner, Rocky J. Holmes, appeals from the Marshall County Circuit Court's denial of his petition for post-conviction relief from various felony convictions and an effective eighteen-year sentence. The petitioner claims on appeal that he was entitled to relief based upon (1) ineffective assistance of counsel and (2) an unknowing and involuntary guilty plea. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

Susan E. McCown, Fayetteville, Tennessee, for the appellant, Rocky J. Holmes.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Charles F. Crawford, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In the underlying prosecution, the petitioner was convicted on his guilty pleas of four counts of aggravated burglary, two counts of theft of property valued at \$1,000 or more but less than \$10,000, three counts of theft of property valued at less than \$500, and one count of alteration of a serial number on an electronic device. The petitioner had several prior convictions from Louisiana. The petitioner pleaded guilty without an agreement as to sentencing. At the sentencing hearing, the trial court sentenced the petitioner as a Range II offender to nine years for each of the aggravated burglary convictions, six years for each of the theft of property under \$10,000 convictions, and eleven months and twenty-nine days for the remaining misdemeanor convictions. The court ordered partial consecutive sentencing for an effective eighteen-year sentence.

The petitioner then filed the present post-conviction action. He claimed counsel was ineffective for failing to investigate his prior convictions and failing to advise him of the sentencing consequences of his pleading guilty without an agreed sentence. He also claimed that his guilty pleas were not knowingly and voluntarily entered because he did not understand that he faced the possibility of enhanced and consecutive sentences.

At the post-conviction hearing, the state presented the testimony of the public defender and an assistant public defender, who represented the petitioner in the conviction proceedings. Both testified that the petitioner did not desire a trial and wanted to plead guilty. They attempted to negotiate a plea agreement with the state, but they were not successful. The state's best offer was thirty-two years as a Range II offender. The petitioner ultimately entered guilty pleas after being unable to reach an agreement with the state. The public defender handled the plea submission hearing, and the assistant handled the sentencing hearing. They said they were concerned that the petitioner's convictions from Louisiana might qualify him for Range III sentencing, and the state took the position that the petitioner was qualified as a Range III offender. Both attorneys testified that the petitioner assured them that he had two felony convictions, which would qualify him for Range II sentencing.

The public defender said the petitioner was adamant he did not qualify for Range III sentencing and did not contend that he was eligible for Range I sentencing. The public defender testified that at the time, her office "didn't have access to NCIC or anything like that" and "about the only investigation we could do [of a client's prior criminal record was] ask our client." She said the usual practice would have been to look at the state's file, as well, for copies of a defendant's prior convictions. She said the copies would have been shown to the client if he questioned them. The state had filed impeachment notices which listed its contention of the petitioner's prior convictions, and the petitioner's trial attorneys testified that they discussed the convictions listed in the impeachment notices with the petitioner. The public defender testified she did not recall what specific certified judgments she showed the petitioner but stated she would have shown him the documents that had been in possession of the state. She did not know whether the petitioner noticed that one document may have been a conviction belonging to his father, rather than him. She stated that she did not know that the conviction in question did not belong to the petitioner and that the conviction could have been a transfer to adult court from juvenile court.

The assistant public defender testified that he reviewed the state's file and thought, based upon the lack of a certified copy of a robbery conviction, there was a possibility of Range I sentencing if the state did not obtain the record. The assistant public defender testified that he was aware of an issue regarding inconsistent birthdates on some of the records, although he could not recall whether he discussed which of the convictions were the petitioner's and which were not. He said he did recall advising the petitioner that he could qualify for no more than Range II sentencing and that counsel thought he could do better at a sentencing hearing than the state's thirty-two year offer. He said that ultimately, the state obtained a certified copy of the robbery conviction before sentencing, and he agreed with the state at the sentencing hearing that the petitioner was a Range II offender. The assistant public defender said that he determined that the petitioner's Louisiana

possession of crack cocaine conviction would be classified as a felony in Tennessee and that he was aware without having to research the issue that the petitioner's Louisiana robbery conviction was classified as a felony in Tennessee.

The petitioner testified at the hearing that he did not deny his guilt of the offenses and that the only issue was whether he would be classified as a Range II or Range III offender at sentencing. He denied that counsel ever showed him any documentation from the state prior to his guilty plea or sentencing. He said counsel advised him of the state's thirty-two year, Range II offer, which he rejected. He said the state rejected his fifteen-year offer. He denied that he told counsel he had two prior felony convictions from out of state. He said he told the defense investigators that he had two out-of-state convictions but that he did not say they were felony convictions. The petitioner stated that two of the convictions listed on the state's Notice of Enhancement were actually his father's convictions. He identified those convictions as being for attempt to commit theft over \$500 and simple robbery. He admitted, however, that he had a robbery conviction when he "was a juvenile bonded over as an adult and convicted." The petitioner also identified an alleged conviction of possession of cocaine listed on the state's impeachment notice which he said was inaccurate because he had not been charged with that offense. The petitioner was asked about a report in the public defender's file which states that the petitioner admitted having two prior felonies from Louisiana and wanted to settle his pending cases. In response the petitioner said, "I don't recall saying that, that I wanted to settle it right then and there, no, sir. . . . I told them I might have had two felony convictions. I had convictions from out of state. I didn't know which ones was misdemeanors or felonies here in Tennessee." He stated that he had one felony and nine misdemeanor convictions.

During the course of the post-conviction hearing, the court received numerous documentary exhibits. These exhibits included the transcript of the petitioner's guilty plea hearing and sentencing hearing, various notices filed by the state in the conviction proceedings, and copies of the convictions upon which the state relied at the petitioner's sentencing.

The trial court found that the petitioner failed to prove that he was a Range I offender and, consequently, that he had not proven that counsel was ineffective based upon the petitioner having received Range II sentencing. The court found that the petitioner failed to prove that counsel had failed to advise the petitioner properly regarding his plea, which the court found was entered voluntarily, knowingly, and intelligently. The court also found that the petitioner did not present evidence that he would not have pleaded guilty if he had been advised differently. The court accredited the proof that the petitioner told the public defender's investigators that he had two felony convictions. The court also found that based upon the petitioner's prior criminal record, he was a proper candidate for consecutive sentencing. The court found that the petitioner received the effective assistance of counsel. Thus, the court denied post-conviction relief.

I

We consider first the petitioner's ineffective assistance of counsel claim. The burden in a post-conviction proceeding is on the petitioner to prove her grounds for relief by clear and

convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to a general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. When a petitioner claims that the ineffective assistance of counsel resulted in a guilty plea, the petitioner must prove prejudice by showing that but for counsel's errors, the petitioner would not have entered the plea and would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). Failure to satisfy either the deficiency or prejudice prong results in the denial of relief. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

In the present case, the petitioner argues that trial counsel failed to investigate and research the petitioner's prior convictions adequately and failed to advise the petitioner adequately of his exposure at sentencing. The trial court accredited the evidence that the petitioner advised counsel he had two prior felony convictions and found that the petitioner had not demonstrated that he had fewer than two felony convictions, notwithstanding the petitioner's claim that some of his father's convictions were entered against him at sentencing. Even on appeal, the petitioner has not made any argument that the assistant public defender was incorrect in his determination that the petitioner had two felony convictions, one for robbery and one for possession of crack cocaine. These are not the same convictions that the petitioner contested as being his father's at the post-conviction hearing. The trial court also accredited the testimony of the petitioner's trial counsel that they explained his options to him, including sentencing following guilty pleas without an agreement. The evidence does not preponderate against the trial court's findings, and those findings support the trial court's legal conclusion that the petitioner failed to demonstrate ineffective assistance of counsel. The petitioner is not entitled to relief on this basis.

II

We consider next the petitioner's claim that his guilty pleas were not entered knowingly and voluntarily. When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the petitioner." North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. See State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). The circumstances include

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citing Caudill v. Jago, 747 F.2d 1046, 1052 (6th Cir. 1984)). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not "voluntary." Id.

The petitioner claims counsel did not inform him of his true sentencing exposure and did not accurately assess his prior record. The undisputed evidence is that the petitioner admitted his guilt of the offenses and wanted to resolve the case by pleading guilty, rather than a trial. He was dissatisfied with the state's sentencing component of the plea offer, which left him with the option of entering open guilty pleas. The transcript reflects that the petitioner voiced his understanding of his pleas at the plea submission hearing and expressed his desire to go forward. The trial court accredited the testimony of trial counsel that they consulted with and informed the petitioner relative to the guilty pleas and sentencing. The record likewise contains a transcript of the guilty plea and sentencing hearings, which reflects that the court reviewed the petitioner's sentencing exposure with him. The trial court found that the petitioner failed to carry his burden of proving his claim that his guilty pleas were not knowing and voluntary. On appellate review, we conclude that he has failed to demonstrate that the evidence preponderates against the trial court's factual findings, and we likewise conclude that the trial court's factual findings support its conclusion that the petitioner was not entitled to relief.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE